MANAGER, FOOK HENG RUBBER WORKS v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson J.) July 8, 1955]

[Ipoh — Criminal Appeal No. 26 of 1955]

Labour Code (Cap. 154), s. 65 — Interpretation of — Meaning of "wilfully" — Necessity of proving knowledge.

This was an appeal against the conviction of the appellant on a charge under s. 65 of the Labour Code. The facts were that at 10.10 p.m. on December 31, 1954, three Labour Officials visited the Fook Heng Rubber Works, Menglembu, which was said in evidence to be the appellant's factory, and found thirty female labourers working in the factory. On that thirty charges of contravening s. 65 of the Labour Code were brought in respect of each of the thirty women. The learned Magistrate convicted the appellant on one of these charges. S. 65 of the Labour Code reads as follows: "65. (i) No female labourer of any age and no male labourer who has not attained the age of eighteen years shall be employed in any kind of labour, other than domestic service, during the night. (ii) For the purposes of this section "night" means a period of not less than eleven consecutive hours, including the interval between ten o'clock in the evening and five o'clock in the morning. (iii) Any employer wilfully disregarding the provisions of sub-section (i) shall be deemed to have committed an offence against this Enactment."

The principal grounds of appeal were: (1) a single charge should have been framed in respect of all the thirty women who were alleged to have been unlawfully employed; (2) having regard to the statutory definition of "night" in sub-s. (ii), it should have been held that "during the night" means and is intended to mean "during the *whole* of the night", that is to say, for a period of 11 consecutive hours including the interval between 10 o'clock in the evening and 5 o'clock in the morning or, at all events, for a period of 11 consecutive hours part of which fell within the interval between 10 o'clock in the evening and 5 o'clock in the morning; (3) knowledge is an essential ingredient of the offence charged, and the prosecution had not discharged the onus which lay upon them of proving "wilful disregard" within the meaning of sub-s. (iii).

Held: (1) there was nothing unlawful in framing the first charge with reference to one of the women only; (2) what is prohibited by s. 65(iii) of the Labour Code is the employment of a woman during any period that constitutes a "night" as defined in s. 65(ii); (3) there was no evidence in this case that the women who were found working in the factory were employed by the appellant or that he had any knowledge that they were working at the time in question or that he was in any way responsible for their working at that time and therefore the conviction must be quashed.

[Editorial Note: See the Employment Ordinance No. 38 of 1955 regulating the employment of women (not yet in force) and, particularly, ss. 52(1), 53(2) and 57(5) which repeat the same phraseology "during a period" but omits "wilful disregard" in ss. 93, 95 and 96.]

Case referred to in the judgment:—

(1) *Reg. v. Anderson* (1846), 9 Q.B. 663; 115 E.R. 1428.

MAGISTRATE'S CRIMINAL APPEAL.

S. K. Das (*Chin Swee On* with him) for the appellant: Case turns on construction of section 65 of Labour Code.

Appellant described in charge as "Manager" of a specified factory. But in evidence it was said it was "Appellant's factory". As regards liability it is immaterial whether he was owner or manager.

Two labour officers found 30 labourers working at 10.10 p.m. in the factory. No evidence that appellant was present or of his knowledge permission or consent.

Prosecution took view that employer is guilty if a woman works at any time between 10 p.m. and 5 a.m.

Section 65 comes from the Genoa Conventions.

Magistrate held the mere fact of a woman working between 10 p.m. and 5 a.m. made owner liable irrespective of *mens rea.*

Also there is the question of whether there should have been one charge or 30 charges — but I shall not proceed on that point.

On the construction of section 65 what does "wilfully" mean? It has always been held "wilfully" is equivalent to "knowingly" or "intentionally".

Young and Harston's Contract 31 Ch. D. 168, 174.

The Queen v. Senior (1899) 1 Q.B. 283.

Lomas v. Peek (1947) 2 All E.R. 574, 575.

Harding v. Price (1948) 1 K.B. 695

Means of knowledge is not the same as knowledge.

John T. Ellis Ltd. v. Walter T. Hinds (1947) 2 K.B. 475 at p. 483.

The doctrine of constructive notice cannot be invoked to fix criminal liability.

There must be some proof of the relationship of employer and employed.

Labourers may be found working but are not necessarily employed by appellant. May be employed without his knowledge or consent, or employed by independent contractor.

Mere fact that labourer is working in the factory raises no presumption.

Section 229 does not apply to section 65.

Section 65 may mean (a) if a labourer works at any time between 10 p.m. and 5 a.m. there is an offence committed or (b) there must be 11 hours consecutive work including the period 10 p.m. to 5 a.m. or (c) period of 11 consecutive hours including part of period 10 p.m. to 5 a.m. Under (b) and (c) the emphasis is on "11 consecutive hours", which are the crucial words.

Section 65 is to be read with section 63. "Agreement" is a verbal agreement and "contract" a written agreement — Section 2.

On the question of construction:—

Cutler v. Wandsworth Stadium (1949) A.C. 398, 410.

What is not prohibited is allowed:—

Maclay v. Dixon (1944) 1 All E.R. 22, 23.

You must not do violence to the language of the statute.

London County Council v. Aylesbury Dairy Co. Ltd. (1898) 1 Q.B. 106.

Gluchowska v. Tottenham Borough Council (1954) 1 All E.R. 408, 410.

Punctuation is no part of the statute.

Pugh Evans v. Ashutosh Sen A.I.R. 1929 P.C. 69.

Craies on Statutes 184.

Schedules to a statute are controlled by the substantive sections — *Craies* p. 208.

Contravention of section 63 is not a criminal offence.

Section 65 comes from the Genoa Conventions of 1920 which are contained in the Schedule to the U.K. Employment of Women etc., Act, 1920. In the Convention (Schedule Part II Art. 2) expression is "during the night" and the Convention defines "night". But the Act says "at night" — Section 1(3). See Part II Art. 2 & 3: Part III Art. 2 & 3.

As to "at" see *In re Railway Sleepers Supply Co.* 29 Ch. D. 204, 206 — refers to a point of time rather than a period. Hence, deliberate use of "at" in the Act.

Pierpoint v. Cartwright 5 C.P. 139, 142.

In that Act "night" has its ordinary meaning — Dusk to dawn. See section 2.

I also refer to provisions of —

Factory and Workshop Act 1901 — section 156, sections 54(c) & 56.

Night defined as 9 p.m. — 6 a.m.

Hours of Employment (Convention) Act, 1936.

Section 1 Schedule Art. 2 & 3.

"During the night" means continuously —

Reg. v. Anderson[1] at 666, 668.

Stroud sub. tit. "during" (I. 896) goes too far —

Austin v. Coleman 37 L.J.M.C. 34 referred to in *Stroud* does not support the proposition that "during" means "during the currency of".

On a construction of section 65 "during" must mean continuously — see definition.

A. P. Jack (Federal Counsel) for the respondent: I agree "wilfully" means "intentionally".

As to meaning of "during" — this can mean (a) throughout or (b) at some point in. In *Reg. v. Anderson*[1] context favoured (a). But in section 65 context favours (b). On any other construction the section is absurd.

Appellant says Prosecution did not prove employment or wilful disregard.

I agree the Record is very short but P.W. 1 said it was "Defendant's factory".

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Thomson J. : — This is an appeal from a decision of the Magistrate at Ipoh. In order to dispose of it, it is necessary to set out the history of the case.

At 10.10 p.m. on the night of 31st December, 1954, three functionaries of the Labour Department visited the Fook Heng Rubber Works, Menglembu, which was said in evidence to be the "Defendant's factory" and found thirty female labourers working in the factory. On that thirty charges of contravening section 65 of the Labour Code were brought against the appellant, a separate charge being brought in respect of each one of the thirty women.

By reason of section 164 of the Criminal Procedure Code only three of these charges could be tried together at one time and on 22nd March, 1955, the appellant appeared on the first three charges. His counsel took the preliminary point that even if his client had done wrong, which was not admitted, he could only have committed one offence and not thirty offences as alleged by the prosecution and that therefore there should not be a separate charge in respect of such of the women but a single charge in respect of all thirty women. After some discussion the Magistrate said he would refer the matter to the High Court which, strictly speaking, he had no power to do, and decided to proceed with the hearing of the first charge. The appellant claimed trial and in the event was convicted and fined $50. Against that conviction and sentence he has now appealed.

Immediately after the conviction the Magistrate attempted to obtain a ruling on the preliminary point which had been raised before him by sending the record of the case to the High Court and inviting the Court to exercise its revisional jurisdiction. This came before me in Chambers but while sympathising with the anxiety of the Magistrate to have the point decided, I declined to consider it in revision because in my opinion it was not relevant to the question of the justice of the conviction and sentence in the case.

In due course the appeal came on for hearing and as it raised questions of some difficulty I reserved judgment.

The first ground of appeal raises the same question as the Magistrate sought to have decided in revision and is that a single charge should have been framed in respect of all the thirty women who were alleged to have been unlawfully employed. As I intimated at the hearing of the appeal, in my opinion, this ground of appeal is misconceived because it relates to a question which did not really arise in the proceedings with which I am here concerned. If a man is said to have stolen thirty bicycles I know of no authority which prevents his being prosecuted for the theft of one of them. Such a course may or may not stand in the way of his subsequent prosecution for the theft of the other twenty-nine. It all depends on the circumstances of the case. But I do not see that the accused is entitled to complain of being charged with the theft of one only. His conviction or acquittal may or may not be a bar to further proceedings in respect of the other twenty-nine but the question does not arise until he is so charged.

Similarly, in the circumstances of the present case there was nothing unlawful in framing the first charge with reference to one of the women only. Whether by doing so the Prosecution are in effect debarred from going on with the other charges cannot arise until the second charge comes on for trial. It will then be open to the appellant to plead *autrefois convict* or *autrefois acquit* as the case may be and the question will have to be decided when that point is taken.

The second and third grounds of appeal raise questions as to the construction of section 65 of the Labour Code which reads as follows:—

"65. (i) No female labourer of any age and no male labourer who has not attained the age of eighteen years shall be employed in any kind of labour, other than domestic service, during the night. (ii) For the purposes of this section "night" means a period of not less than eleven consecutive hours, including the interval between ten o'clock in the evening and five o'clock in the morning. (iii) Any employer wilfully disregarding the provisions of sub-section (i) shall be deemed to have committed an offence against this Enactment."

That section is clearly based on, and is no doubt intended to apply, the provisions of the Genoa Convention of 1920 concerning night work of women employed in industry, the terms of which are to be found in the Schedule to the United Kingdom Employment of Women, Young Persons and Children Act, 1920. In that connection I pause to make two observations. The first is that that Convention was never intended to be directly binding on individuals but was an International Convention binding the States who were parties to it to introduce domestic legislation giving effect to its provisions. The second is, and here I speak from some small personal knowledge, that all the International Conventions arrived at under the auspices of what used to be the International Labour Organisation were so drafted as to be capable of equally precise expression in both French and English, the two official languages of the Organisation. I make these observations because they may throw some light on the very peculiar wording of the section.

Two main points of difficulty arise.

In the first place, there is the question of interpretation of sub-section (i) and (ii). These sub-sections clearly contain a prohibition. But what do they prohibit? What is the *factum delicti?*

S. K. Das for the appellant has argued with great persuasiveness that what is prohibited is the employing of a female labourer for the whole of any period of not less than eleven consecutive hours which includes the period of seven hours between ten o'clock in the evening and five o'clock in the morning. In support of that he relied very strongly on the case of *Reg. v. Anderson*[1]. In that case it was held that a statement in a ground of appeal that a person served in certain offices for certain specified years "during which years he was.....resident" in a certain place meant that he had resided in the place in question during the whole of these years. In that connection Lord Denman C.J. observed:—

"With respect to the words "during which years," it appears to me that in their strict and proper legal sense they mean for the whole of those years; and that the other meaning, namely, "at some time in those years," is colloquial and incorrect."

Mr. Jack on the other hand has argued that although the precise extent of the prohibition cannot be ascertained from the terms of the section it is clear that at the very lowest there is a breach of it if any woman is employed at any time between ten o'clock in the evening and five o'clock in the morning.

Putting aside for the moment the curious definition of "night" contained in sub-section (ii) the words to be construed are "no female labourer.....shall be employed.....during the night".

Now, these words clearly constitute and are to be construed as a prohibition. They do not mean that all persons who are not women may be employed during the night or that women may be employed at any time except during the night. They mean that women must not be employed during the night. I say that there is a prohibition for two reasons. The first is that the general rule of law is still, fortunately, that what is not forbidden by law is allowed and so a permission can only have meaning by way of exception to some antecedent prohibition. Here there is no general provision of the law forbidding the employment of persons generally and therefore a provision permitting

the employment of certain classes of persons is meaningless. In the second place by reason of sub-section (iii) some sort of breach of the provisions of sub-section (i) is clearly constituted some sort of criminal offence and there can be no offence against a permissive provision.

It follows, then, that the word "No" is not a qualifying word adjected to "female labourer" but is the negative particle attached to the verb "shall be employed". In other words, the precise meaning to be attached to the provision is "a female labourer shall not be employed during the night".

On this interpretation the words "during the night" must be taken in the ordinary grammatical usage of the English language to qualify the words "shall not be employed". That is to say, returning to the rather clumsy wording of the section, the words "during the night" do not qualify only the words "shall be employed" but qualify the words "no female labourer shall be employed".

These considerations compel me to the conclusion that, grammatically speaking, what is to endure during the night is not the employment of a woman but her non-employment. And that in its turn leads, forensically speaking, to the corollary that what is to endure during the night is the prohibition of employment. It follows, therefore, as a further corollary that if a woman is employed at any time during the night whether or not there is a criminal offence there is certainly a breach of the prohibition.

Not only does such a construction seem to be in accordance with the correct grammatical usage of the English language but it seems to me to be entirely in accordance with the observations of Lord Denman which were relied on to a contrary purpose by counsel for the appellant. What His Lordship was concerned with was what constituted residence during a period of years, not what constituted non-residence. In other words what did or did not exist during the years was a positive condition and not a negative one. The word "during" connotes continuity. In the case of a positive duty which is to endure for a given time any failure to perform it breaks the continuity and equally in the case of a prohibition any breach of it breaks the continuity. In other words in the case of a positive obligation continuity is broken by something negative but in the case of a negative obligation it is something positive that breaks the continuity.

I now pass to the difficulty which arises from the extraordinary definition of "night" contained in sub-section (ii). That definition includes not a thousand and one different nights but an infinite number of nights for there are an infinite number of different periods of eleven consecutive hours which include the period between 10.00 p.m. and 5.00 a.m. The dilemma then arises that if it includes all of these periods then in effect it continues the prohibition during a period of fifteen hours and not eleven hours and if it includes only one of these periods then there is complete uncertainty as to which period it does mean. In the circumstances I am bound to say that as a whole the definition is incapable of precise and exhaustive interpretation. It does not, however, follow that it is wholly devoid of meaning. After all parallel lines meet at infinity and though language cannot define what infinity is such a failure of definition does not affect the practical truth of the proposition that two particular parallel lines will be as far apart at Singapore as they are at Ipoh. This point becomes clear when the definition is read in its context with sub-section (i), sub-section (i) itself being read in the sense which has been attributed to it. From what has been said in relation to sub-section (i) it follows that employment of a woman for any moment during any period that constitutes a "night" is a breach of the prohibition in that sub-section. I express no opinion as to what the position would be if that moment occurs during the period of 4 hours prior to 10.00 p.m. or the period of 4 hours succeeding 5.00 a.m. It may possibly be, though to say so would probably be to strain unduly the language of the section, that if that moment of employment occurs at any time between 6.00 p.m. and 9.00 a.m. there is a breach of the prohibition. But the question does not arise in the present case and I mention it as indicating a difficulty of interpretation only because I understand that the legislature has it in mind to replace the whole Ordinance by a new one and will no doubt take the opportunity to express itself on the point with more clarity than in the existing Ordinance. Putting that difficulty aside, however, I think it is abundantly clear that any moment of employment which falls between 10.00 p.m. and 5.00 a.m. is clearly and squarely caught by the prohibition because such a moment must necessarily fall within every single one of the infinite number of "nights" falling within the scope of the definition. Returning to the mathematical analogy, we do not know where the place is where the parallel lines meet but we do know it is not between here and Singapore and that if they do meet between here and Singapore then the lines are not parallel.

I now pass to a consideration of sub-section (iii) which involves a consideration of the third ground of appeal which is in effect that to put it at the very lowest knowledge is an essential ingredient of any offence under the section and that in the present case

the prosecution did not discharge the onus which lay upon them of proving knowledge.

I repeat the words of the sub-section which are as follows:—

"(iii) Any employer wilfully disregarding the provisions of sub-section (i) shall be deemed to have committed an offence against this Enactment."

Now, I am not sure that I fully understand what this means. It is not a form of words that is usual in statutes. Indeed, I cannot remember having seen it used in any other statute. It might be argued that wilfully to disregard anything is a contradiction in terms and an impossibility. Again it might be argued that what is to be deemed an offence is a process of cognition and not any overt act. These questions, however, do not arise at this stage. They may well arise when the second charge comes before the Magistrate, if it ever does, and by reason of the first charge having been adjudicated upon his answer to the question may well be influenced by the view he takes of the metaphysical question of the possibility of simultaneous processes of cognition. For the purposes of the present case, it will be sufficient to assume that what is an offence is any overt act which is wilfully committed and which amounts to a contravention of the provisions of sub-section (i). I do not see that the mental element can be any further excluded than that for to say that a thing is done wilfully necessarily implies that it is done with knowledge. It is impossible to lay down any exhaustive rule as to what overt acts would constitute the offence or as to what quantum of evidence would be sufficient to give rise to the inference of knowledge and I do not propose to attempt to do so here.

The truth is that in the present case there is not a scintilla of evidence that the women who were found working in the Fook Heng Rubber Works Factory at 10.10 p.m. on 31st December were employed by the present appellant or that he had any knowledge that they were working at the time in question or that he was in any way responsible for their working at that time. It is possible that very little evidence would have been necessary to give rise to some such inference. But there was no evidence. The factory was said to be the defendant's but beyond that there was nothing. The Labour Code contains a very comprehensive definition of "employer" but there was nothing to shew that the women had any contract of employment with the defendant or with any other person whose agent or manager he was. There was nothing to shew that he did have or could have had or should have had any knowledge that they were working. In the circumstances, it was impossible to say that there was any causal connection between the fact that they were working and anything he had said or done. In the circumstances the conviction cannot stand.

The appeal is allowed. The conviction is quashed and an order made of acquittal and discharge. The fine, if paid, will be refunded.

Appeal allowed.

Solicitor for the appellant: *Chin Swee On.*

PUBLIC PROSECUTOR v. LIM PENG SENG

[A. Cr. J. (Thomson J.) July 22, 1955]

[Ipoh — Juvenile Appeal No. 50 of 1955]

Common Gaming Houses Ordinance 1953, s. 4(1)(c) — Assisting in the carrying on of a public lottery — Charge — Whether prosecuting officer can himself give expert evidence.

In this case the respondent was charged before the Juvenile Court at Sitiawan as follows: "That you on 16.4.55 at about 8.30 a.m. at Telok Muroh, Lumut, in the District of Dindings were found in possession of 40 lottery tickets relating to a public lottery to wit "100, 1,000 and 10,000 characters lottery" thereby did assist in the carrying on the said public lottery and that you have thereby committed an offence punishable under s. 4(1)(c) Ordinance 26/53."

The facts shortly were that the respondent was found together with his father in the hall of premises which were raided by the police. The evidence showed that the respondent was sitting at a table with a pen containing red ink. In front of him were found a pen with blue ink and two small booklets. The pages of the booklets were alleged to be lottery tickets. No evidence was given of what the father was doing. At the trial the prosecuting officer stated that he himself proposed to give expert evidence as to the nature of the booklets. The learned President without deciding whether or not he would allow the prosecuting officer to give such evidence held that possession of the booklets had not been made out against the respondent and therefore acquitted him. Against this decision the Public Prosecutor appealed.

Held: (1) although the respondent was not in possession of the booklets there might well have been evidence which would have given rise to the inference that he was assisting his father to carry on a public lottery by doing something in relation to the booklets; (2) the learned President was wrong in coming to a decision before he decided whether he would allow the prosecuting officer to give expert evidence or not; (3) in the circumstances the order of acquittal must be set aside and a retrial ordered.

MAGISTRATE'S CRIMINAL APPEAL.

A. P. Jack (Federal Counsel) for the appellant.

A. S. Yeo for the respondent.

Cur. Adv. Vult.

Thomson J.: — This is an appeal by the Public Prosecutor against a decision of the Juvenile Court at Sitiawan presided over by the Sessions Court President. I do not think that there has been any substantial miscarriage of justice for, quite frankly, I do not think the respondent who is a boy of 12 years should have been prosecuted at all. The case, however, was a peculiar one and by reason of its circumtances I feel compelled to take a certain course.